



IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1276

HON. LEO OXBERGER,

Petitioner,

vs.

JOHN R. WINEGARD,

Respondent.

RESISTANCE TO PETITION FOR
WRIT OF CERTIORARI
TO THE SUPREME COURT OF IOWA

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SUBJECT INDEX

	Page
Question Presented	1
Statement of the Case	2
Argument:	
I. Deposition of Reporter is Necessary and, in View of Response to Request for Admissions, is Proper	7
II. The Orderly Administration of Justice, Founded on Meaningful Access to the Courts, is a Compelling Interest Which the Supreme Court of Iowa Properly Weighs Against Competing Interests.	11
Conclusion	16

TABLE OF CITATIONS

Cases:	Page
<i>Blackmer v. United States</i> , 284 U.S. 421 (1932)	13
<i>Blair v. United States</i> , 250 U.S. 273 (1919)	13
<i>Branzburg v. Hayes</i> , 408 U.S. 665 (1972)	14
<i>Chambers v. Baltimore & Ohio R.R.</i> , 207 U.S. 142 (1907)	14
<i>Garland v. Torre</i> , 259 F.2d 545 (2nd Cir. 1958)	11
<i>In re Marriage of Winegard</i> , 257 N.W.2d 609 (Iowa 1977)	7, 8
<i>Pennekamp v. Florida</i> , 328 U.S. 331 (1946)	12, 13

	Page
<i>United States v. Liddy,</i> 354 F.Supp. 208 (D.D.C. 1972)	11
<i>United States v. Nixon,</i> 418 U.S. 683 (1974)	14
<i>Winegard v. Larsen,</i> 260 N.W.2d 816 (Iowa 1977)	7
<i>Winegard v. Oxberger,</i> 258 N.W.2d 847 (Iowa 1977)	7, 13
Statutes:	
<i>Rule 127, Iowa Rules of Civil Procedure</i>	10

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QUESTION PRESENTED

Is a litigant entitled to depose a reporter concerning a reporter's communications with a defendant in a defamation action, when the plaintiff in the defamation action has shown that the information is necessary or critical to the cause of action, that other reasonable means available by which to obtain the information sought have been exhausted (in this case in response to Request for Admissions underlying defendant denied making any of the defamatory statements attributed to him by reporter and denied knowledge of the sources) and where the defamation action is not patently frivolous?

STATEMENT OF THE CASE

January 10, 1975, suit was filed in Scott County, Iowa, by John R. Winegard in which Richard A. Larsen, Stephen L. Schalk, Robert C. Bradfield and Larsen, Schalk & Bradfield, a partnership and/or association engaged in the practice of law, were named defendants. The action was precipitated by two newspaper articles published by the Des Moines Register and Tribune Company. Within the articles are contained, among others, the following defamatory statements:

"Mrs. Winegard's attorney, Stephen Schalk, of Davenport said the two exchanged wedding rings during a return flight from Las Vegas in 1971 and have held themselves out to the community as husband and wife since that time.

"A daughter from one of Sally Ann Winegard's previous marriages had her last name changed to Winegard by the two adults, according to the attorney.

"Schalk said that despite being embroiled in divorce proceedings, John and Sally Ann have continued living together for more than two years since she filed the original dissolution of marriage papers."

March 1, 1975, on notice and pursuant to the Iowa Rules of Civil Procedure, John R. Winegard attempted to depose the writer of the newspaper articles in Des Moines, Iowa. After the reporter refused to answer pertinent questions going to the heart of John R. Winegard's case, Mr. Winegard's attorneys terminated the deposition. The following statement was made:

"Counsel for Plaintiff at this point is unwilling to proceed with the taking of the deposition because of the constant refusal by the witness to answer the questions which have been asked of the witness; that the statement has been made into the record by counsel for the witness that she is not to give testimony other than as delineated in the statement read by counsel; that consistently the witness on the advice of counsel, adopted by the witness, has refused to answer the question; that at this time there is no further purpose in proceeding with asking questions which obviously - and, as I have been assured by counsel, will be met by the same objection. So,

therefore, it is my intention to now stop, as far as I am concerned, my further deposing of this witness, and I will, of course, proceed according to the Rules to have the witness cited to answer the questions. We will take the appropriate procedures which will be to file a motion, I believe, to compel discovery."

Examples of questions the reporter refused to answer are:

1) "What knowledge did you have on which you wrote the story which carries your byline, Plaintiff's Exhibit 2 [Jan. 8, 1975 Des Moines Tribune story]?" Deposition Transcript at 20.

2) "Would you state whether you had any conversation with a lawyer in Davenport, Iowa, named Stephen L. Schalk, on January 8th or 9th?" Deposition Transcript at 20.

3) "Did you have any conversation with any of the defendants, Mr. Larsen or Mr. Bradfield, other than Mr. Schalk?" Deposition Transcript at 20.

4) "I direct your attention to Plaintiff's Exhibit 1 and the article therein, and you have the article before you. Again, we are referring to the article published under your byline, Diane Graham, Wednesday, January 8, 1975, in the Des Moines Tribune. I direct your attention to the article. I ask if you made this statement therein - wrote this statement and caused it to be published. Reading the second paragraph, 'John R. Winegard, 54, filed the petition in U.S. District Court here claiming the woman known to the Burlington community as Sally Ann Winegard, 31, is not his common-law wife, despite facts that indicate the two have lived together since 1971 and still are living together despite the legal battles.'

Now, I will ask you, Miss Graham, please, what is the basis for the statement you made which I have just read, 'Despite facts that indicate the two have lived together since 1971? What facts did you then know?' Deposition Transcript 22 and 23.

5) "Continuing, the statement is made, 'and still are living together despite the legal battles.' What facts did you have on which you made the written statement, 'still are living together despite the legal battles?'" Deposition Transcript at 23.

6) "Will you state from whom you received the facts on which you made the statement referred to as, 'Facts that indicate the two have lived together since 1971 and still are living together despite the legal battles?'" Deposition Transcript at 24.

7) "Continuing with the article, Miss Graham, I am now referring to what would be the sixth paragraph in the composition of the article, and I read as follows: 'And he holds to the contention that he is single despite the fact that:

"The Des Moines County District Court ruled last October that a common-law marriage existed between the two.'

"Will you state, please, on what basis you made the statement and on what facts you had on which you made the written statement from the article I have just read?" Deposition Transcript at 24.

8) "The next paragraph, which I would count as eight in the composition of the article, reads as follows:

'Mrs. Winegard's attorney, Stephen Schalk, of Davenport said the two exchanged wedding rings during a return flight from Las Vegas in 1971.' Will you state whether that is a true statement which you so wrote?" Deposition Transcript at 25.

9) "Continuing with the reading of paragraph No. 8, and deleting the first part, but commencing with the - deleting the middle part, 'Mrs. Winegard's attorney, Stephen Schalk, of Davenport, said,' and now I go down to the last three lines, 'and have held themselves out to the community as husband and wife since that time.' Now, was that a correct statement when you wrote it and caused it to be published January 8, 1975?" Deposition Transcript at 25.

10) "Reading from the next paragraph, Plaintiff's Exhibit 1, 'A daughter from one of Sally Winegard's previous marriages had her last name changed to Winegard by the two adults, according to the attorney.'

"Would you state whether that was a true statement given to you by Stephen Schalk as you stated in the article, and whether that was true and correct

as you stated it in the article, Plaintiff's Exhibit 1?" Deposition Transcript at 26.

11) "The 13th paragraph in the composition of the article byline by you, published January 8, 1975, Plaintiff's Exhibit 1, reads as follows:

"Schalk, Sally Ann Winegard's attorney, said the answers to the detailed financial question are necessary for determining property settlements and alimony."

"Will you state whether that statement was given to you by Stephen Schalk, preliminary and prior to your composing the article and writing it?" Deposition Transcript at 27.

12) "I believe I may have asked, and you may have objected, but for the record, I will ask again. Did you have any conversation with Stephen L. Schalk prior to writing this article?" Deposition Transcript at 28.

13) "Schalk said that despite being embroiled in divorce proceedings, John and Sally Ann have continued living together for more than two years since she filed the original dissolution of marriage papers."

"Will you state whether Mr. Schalk did so tell you that?" Deposition Transcript at 28.

14) "Would you tell me, Diane, in a normal composition of a story, and particularly related to this story which you wrote - this story is perhaps the wrong word. Let's say news account bearing your byline, instead of story, published January 8, 1975, Plaintiff's Exhibit 1, how do you go about preparing to write a story of this sort? I use the word again. News account." Deposition Transcript at 32.

15) "Well, now, if the statement is correct that you wrote these articles for publication as dictated by counsel, then your prior statement would be incorrect if you said that you wrote the substance of paragraph No. - was it 8 you were talking about? Did you write the article or did you write the substance of the article?" Deposition Transcript at 33.

16) "So that based on advice of counsel, you don't now wish to clarify whether the statement given and dictated by counsel that you wrote the articles is correct or incorrect, or your subsequent testimony here that you wrote the substance of the paragraph that I have referred to is correct or incorrect. Is there a distinction between writing an article and writing the substance?" Deposition Transcript at 34.

17) "All right. In the statement filed by counsel in your behalf, it is stated that you are prepared to testify that the facts contained in these articles are substantially correct to the best of your knowledge. Now, I am asking that you tell me what is your knowledge on which you predicate the fact that these articles are substantially correct. I am just asking you to explain the knowledge that you - your counsel has said you have and which you are prepared to testify to." Deposition Transcript at 35.

18) "Will you please state what is the best of your knowledge, which counsel for you have today represented you have, on the basis of which counsel has further stated that the articles, Exhibits 1 and 3, are substantially correct? That is all I am asking, very simple." Deposition Transcript at 37.

19) "And have you preserved your notes?" Deposition Transcript at 38.

20) "Would you state whether the notes which you made are in your possession or someone else's possession?" Deposition Transcript at 39.

21) "If you did, when did you turn the notes over to some other person than yourself?" Deposition Transcript at 39.

22) "And I suppose I ask then, as I will and see what your answer is, who else have you talked to about it other than Mr. Smith and Mr. Riley? When I say it, I refer to the fact that I called you and requested that you save your notes and I would like to see your notes. Who did you speak with about that?" Deposition Transcript at 42.

March 11, 1975, John R. Winegard requested Admissions from Stephen L. Schalk.

April 2, 1975, Schalk filed Answers to Request for Admissions wherein he denied making any of the defamatory statements which appeared in the newspaper articles and indicated that he did not know who made the statements or communications to the reporter.

May 6, 1975, Iowa District Court refused to compel discovery from the newspaper reporter.

June 16, 1975, the Supreme Court of Iowa issued a Writ of Certiorari directed to the district court judge so that the legality of the district court's ruling could be determined.

May 12, 1976, defamation division of underlying petition survived motion for summary judgment; invasion of privacy division was dismissed.

October 19, 1977, the Supreme Court of Iowa ruled the district court judge acted illegally or exceeded his jurisdiction in overruling John R. Winegard's Motion to Compel Discovery by deposition of the reporter.

The dismissal of one division of the underlying petition, the invasion of privacy division, prior to oral argument in *Winegard v. Oxberger*, 258 N.W.2d 847 (Iowa 1977), was affirmed in *Winegard v. Larsen*, 260 N.W.2d 816 (Iowa 1977).

Statement on behalf of Hon. Leo Oxberger at page 8 of Petition for Writ of Certiorari that the Supreme Court of Iowa in *In re Marriage of Winegard*, 257 N.W.2d 609 (Iowa 1977), affirmed a trial court finding that a common law marriage existed between John R. Winegard and Sally Ann is false. The question of the existence of that alleged common law marriage is currently on appeal to the Supreme Court of Iowa. At the time of the drafting of this document, the filing of briefs has not been completed.

ARGUMENT

I. DEPOSITION OF REPORTER IS NECESSARY AND, IN VIEW OF RESPONSE TO REQUEST FOR ADMISSIONS, IS PROPER.

At page 8 of Petition for Writ of Certiorari, Petitioner states that *In re Marriage of Winegard*, 257 N.W.2d 609 (Iowa 1977), "affirmed the trial court's finding that a common law

marriage existed between [John] Winegard and Sally Ann * * *. This decision relates only to allowance of temporary attorney fees.

The quoted statement of Petitioner is not only misleading, it is inaccurate and wrong:

"Nothing we have said here is intended to prevent [John R. Winegard] from challenging the sufficiency of the evidence to establish a common law marriage in the event of an appeal from a final judgment on the merits in the dissolution proceeding." *In re Marriage of Winegard*, 257 N.W.2d 609, 617 (Iowa 1977).

The Opinion makes it clear that all a party needs to show is a fair presumption of the existence of a marital relationship in order to entitle that party to make a request for temporary attorney fees. See *In re Marriage of Winegard*, 257 N.W.2d 609, 615 (Iowa 1977). The affirmance goes only to the showing of that quantum for the purpose of temporary attorney fees.

Additional inaccuracy in the Petition for Writ of Certiorari occurs when Petitioner implies that John R. Winegard sought to compel the testimony of a reporter in a vacuum without attempting in any way to obtain evidence elsewhere. Glossed over are the Admissions from the underlying Defendant, Stephen L. Schalk. In Response to Request for Admissions Schalk denies under oath that:

1) *** Stephen L. Schalk indicated that John R. Winegard contends that the woman known to the Burlington community as Sally Ann Winegard, is not his common-law wife, despite facts that indicate that the two have lived together since 1971 and are still living together."

2) *** Stephen L. Schalk indicated to the reporter that the Des Moines County District Court ruled in October of 1974 that a common-law marriage existed between John R. Winegard and the woman Stephen L. Schalk referred to as Sally Ann Winegard."

3) *** Stephen L. Schalk indicated that John R. Winegard and the woman Stephen L. Schalk referred to as Sally Ann Winegard exchanged wedding

rings during a return flight from Las Vegas in 1971."

4) *** Stephen L. Schalk indicated that John R. Winegard and the woman Stephen L. Schalk referred to as Sally Ann Winegard have held themselves out to the community as husband and wife since a return flight from Las Vegas."

5) *** Stephen L. Schalk indicated that a daughter from one of the woman's (which woman Stephen L. Schalk referred to as Sally Ann Winegard) previous marriages had her last name changed to Winegard by John R. Winegard and the woman Stephen L. Schalk referred to as Sally Ann Winegard."

6) *** Stephen L. Schalk indicated that John R. Winegard and the woman Stephen L. Schalk referred to as Sally Ann Winegard have continued living together for more than two years since the woman Stephen L. Schalk referred to as Sally Ann Winegard filed the original dissolution of marriage papers."

7) *** Stephen L. Schalk indicated that the woman Stephen L. Schalk referred to as Sally Ann Winegard had filed a dissolution action against John R. Winegard."

8) *** Stephen L. Schalk indicated that Stephen L. Schalk had instructed the woman Stephen L. Schalk referred to as Sally Ann Winegard that she would not have to leave the house she was living in because it was as much Sally Ann's house as it was John R. Winegard's house."

Despite admitting to conversing with reporter on or about January 7, 1975, Schalk in his response to Request for Admissions claims he does not know who are the sources of information in the following excerpts from the January 8, 1975, Des Moines Tribune story:

1) "John R. Winegard, 54, filed the petition in U.S. District Court here claiming the woman known to the Burlington community as Sally Ann Winegard, 31, is not his common-law wife despite facts that indicate the two have lived together since 1971 and are still living together despite the legal battles."

2) "And he holds to the contention that he is single despite the fact that:

"The Des Moines County District Court ruled last October that a common-law marriage existed between the two."

3) "Mrs. Winegard's attorney, Stephen Schalk, of Davenport said the two exchanged wedding rings during a return flight from Las Vegas in 1971 and have held themselves out to the community as husband and wife since that time."

4) "A daughter from one of Sally Ann Winegard's previous marriages had her last name changed to Winegard by the two adults, according to the attorney."

5) "Winegard appealed the Des Moines County Court's decision on his marital status to the Iowa Supreme Court, but the high court refused to hear his appeal until the divorce dissolution of marriage proceedings were made final at the county level."

6) "Schalk said that despite being embroiled in divorce proceedings, John and Sally Ann have continued living together for more than two years since she filed the original dissolution of marriage papers."

What is the effect of the Admissions? Schalk denies he indicated to reporter the defamatory statements contained in the article. Schalk denies he is the source of any of the defamatory statements in the article.

Petitioner, in the Supreme Court of Iowa, attempted to characterize these Admissions as a "ploy."

Admissions are a serious and effective form of discovery:

"* * * A denial [of a matter of which an Admission is requested] shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as true and qualify or deny the remainder. * * *" Rule 127, *Iowa Rules of Civil Procedure*.

Schalk denies he is the source of the defamatory statements in the article. Schalk asserts he does not know who

is the source of the defamatory statements. This is established by Schalk's Answers to Request for Admissions.

If Schalk is telling the truth, the testimony of Graham is indispensable. Who was the source? Cf., e.g., *Garland v. Torre*, 259 F.2d 545 (2nd Cir. 1958).

If Schalk is lying, the testimony of Graham is indispensable. How is John R. Winegard to prove Schalk is lying? Cf., e.g., *United States v. Liddy*, 354 F.Supp. 208 (D.D.C. 1972). A bland and broad assertion by the reporter that her articles are substantially true is no substitute for the evidence necessary for orderly judicial process.

Mr. Nixon once said he had told the complete story of Watergate.

If Schalk is lying in his Admissions and the reporter is granted a privilege in this situation, the real privilege being granted is to one such as Schalk. Schalk would be granted the privilege to falsify with impunity, secure in the knowledge that Winegard could not force the reporter to disclose what she knows. Is this the kind of privilege a court should grant?

A result contrary to that reached by the Supreme Court of Iowa would establish a license to lie and a roadblock to the orderly administration of justice.

II. THE ORDERLY ADMINISTRATION OF JUSTICE, FOUNDATIONED ON MEANINGFUL ACCESS TO THE COURTS, IS A COMPELLING INTEREST WHICH THE SUPREME COURT OF IOWA PROPERLY WEIGHS AGAINST COMPETING INTERESTS.

The issues in this action are no longer novel. They nonetheless touch on some of the most fundamental precepts of American democratic freedom.

The orderly administration of justice must not be fogged and frustrated by the shibboleth of press freedom. The very real vitality of a free press depends upon the preservation of each person's personal freedoms. Personal freedoms ultimately are preserved in the courts. An institution such as the press must not be allowed to tie any one man in chains and trample on his personal freedoms. A high-handed policy of ar-

bitrariness and a license to frustrate the judicial process is not what is or was ever contemplated by a free press.

"* * * [T]he purpose of the Constitution was not to erect the press into a privileged institution but to protect all persons in their right to print what they will as well as to utter it." *Pennekamp v. Florida*, 328 U.S. 331, 364 (1946) (Frankfurter, J., concurring).

So long as the rights of one are trampled, so too are the rights of all. So long as any institution is "more equal," so long as any institution may hold itself above judicial process, the rights of those who are "less equal" have vanished.

"No institution in a democracy, either governmental or private, can have absolute power." *Pennekamp v. Florida*, 328 U.S. 331, 355 and 356 (1946) (Frankfurter, J., concurring).

The press has a vital role to play in the American system. The vitality of that role puts upon the press a special duty and a special responsibility to come forward and perform that role in the American system which is the personification of the pursuit of justice – the giving of testimony in the witness stand.

"In plain English, freedom carries with it responsibility even for the press; freedom of the press is not a freedom from responsibility for its exercise." *Pennekamp v. Florida*, 328 U.S. 331, 356 (1946) (Frankfurter, J., concurring).

We must never lose sight of the foundation of our system. We must never allow the finely attuned mechanism of democratic freedom to break down.

If Watergate has any lessons for the American people, those lessons are:

- 1) No institution, not even the presidency, can be given a free and arbitrary license to disregard the rights of others;
- 2) Ultimately, it is the judiciary that protects the rights of everyone; and
- 3) The touchstone of orderly judicial process is the pursuit of the truth from witnesses via the taking of testimony.

"* * * [I]t is clearly recognized that the giving of testimony and the attendance upon court or grand

jury in order to testify are public duties which every person within the jurisdiction of the Government is bound to perform * * *. The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public. * * *" *Blair v. United States*, 250 U.S. 273, 281 (1919).

It might be easy to disregard the rights of Winegard in favor of the Des Moines Register and Tribune Company were it not for the knowledge that the rights of Winegard are the rights of everyone. These are our most fundamental rights.

These rights are the oil in the cogs of the mechanism of democratic freedom. The presidency is not an end in itself. The Des Moines Register and Tribune Company is not an end in itself.

"Without a free press there can be no free society. Freedom of the press, however, is not an end in itself but a means to the end of a free society * * * and the proper functioning of an independent judiciary puts freedom of the press in its proper perspective." *Pennekamp v. Florida*, 328 U.S. 331, 354 and 355 (1946) (Frankfurter, J., concurring).

Only by the orderly administration of justice, the pursuit of the truth in a court of law, is the mechanism of democratic freedom preserved. *Winegard v. Oxberger*, 258 N.W.2d 847 (Iowa 1977), allows that mechanism to work.

The pursuit of justice is above mystical, self-serving, selfish desires for privileges.

American constitutional justice entrusts to the Court, not to commercial printers and publishers and their editorial and business staffs, the ultimate responsibility for protecting rights personal to each and every citizen.

American constitutional justice is founded on citizens taking the witness stand to tell the truth. Cf. *Blackmer v. United States*, 284 U.S. 421, 438 (1932) ("It is also beyond controversy that one of the duties which the citizen owes to his government is to support the administration of justice by attending its courts and giving his testimony * * *").

There is nothing sagging or stale about the fundamental right of access to the courts and the right to every man's evidence. This foundation of American constitutional

democracy was, is, and remains the alternative to the gun battle in the streets.

"The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government." *Chambers v. Baltimore & Ohio R. R.*, 207 U.S. 142, 148 (1907).

This reasoning is no less forceful today than it was in the past:

"The privileges referred to by the Court [in *Branzburg v. Hayes*, 408 U.S. 665 (1972)] are designed to protect weighty and legitimate competing interests. Thus, the Fifth Amendment to the Constitution provides that no man 'shall be compelled in any criminal case to be a witness against himself.' And, generally, an attorney or a priest may not be required to disclose what has been revealed in professional confidence. These and other interests are recognized in law by privileges against forced disclosure, established in the Constitution, by statute, or at common law. Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *United States v. Nixon*, 418 U.S. 683, 709 and 710 (1974).

Supreme Court of Iowa finds:

- 1) Many of the statements contained in reporter's article were attributed to Schalk;
- 2) There exists a constitutionally based newsperson's privilege which is neither absolute nor unlimited;
- 3) Winegard's interest in obtaining reporter's deposition constitutes "an undiluted, compelling state interest of such persuasive force as to subordinate a newsperson's privilege to withhold confidential information";
- 4) The criteria for judging whether state interest is compelling is:
 - a. The information must be necessary or critical to the involved cause of action or defense pled;

b. Other reasonable means available by which to obtain information sought must be exhausted; and

c. The action or defense must not be patently frivolous.

5) Winegard's discovery from reporter is necessary and critical to his cause of action; Winegard needs to know what was said to reporter and by whom;

6) In response to Request for Admissions, Schalk admitted having conversed with Graham by phone about Winegard's federal court action, but denied having made statements attributed to him by reporter's articles;

7) Request for Admissions constitutes reasonable use and exhaustion of other plausible avenues of obtaining information under the circumstances of this case;

8) While discovery methods other than Request for Admissions may have been available to Winegard, Iowa Supreme Court does not find any alternate approach would have been more fruitful; it is not for the Court to dictate counsel's discovery tactics;

9) Reporter is the only remaining person who could conceivably provide the information essential to defamation action against Schalk and his associates;

10) Winegard's action against Schalk and his associates is not patently frivolous;

11) There is no cause to hold Winegard is abusing judicial process to force a wholesale disclosure of a reporter's confidential news sources;

12) There is no basis to hold Winegard embarked or has pursued a course designed to annoy, embarrass, or oppress reporter; and

13) Judge Oxberger exceeded his jurisdiction or otherwise acted illegally in overruling Winegard's Motion to Compel Discovery of reporter.

The Supreme Court of Iowa carefully fashioned standards which protect free speech rights and interests which at the same time uphold the fundamental rights and interests the people have in meaningful access to the judicial system.

CONCLUSION

The Supreme Court of Iowa intelligently and logically applies the Constitution to the facts of this case. John R. Winegard respectfully requests that this Court decline to issue a Writ of Certiorari.

Respectfully submitted,

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